IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.38 of 1995

Decided on : June 20, 2007

Babu Ram **....Appellant.**

VERSUS

Gian Chand and another **....Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellant : **Mr. R.K. Sharma, Advocate.**

For the Respondents : **M/s Ramakant Sharma & Bhuvnesh Sharma, Advocates.**

Surjit Singh, Judge (Oral)

This second appeal by the plaintiff-appellant, who has been unsuccessful, both in the trial Court as also the first Appellate Court, was admitted on the following substantial questions of law:

1. When the compromise deed and the judgment dated 29th July, 1948 in Civil Suit No.328 of 1948 do not say anything about the Khata No.39, i.e., the land in dispute, whether the learned Courts below are justified that this Khata No.39 has been given to the defendants under the said compromise and judgment?
2. Whether the stand of the defendants to the effect that Khata No.39 has been given to them in Civil Suit No.328 of 1948 on 29th July, 1948 has not belied by the partition order dated 16th August, 1948, which has partitioned the Khata No.39 between the parties?

Whether the reporters of the local papers may be allowed to see the Judgment?

3. Whether the learned Courts below are justified in holding that the suit is not maintainable in the present form?
4. Whether the learned Courts below are justified in ignoring the plaintiff's documentary and oral evidence which goes to the root of the case?

2. Facts relevant for the disposal of the appeal may be summed up thus. Appellant, who shall hereinafter be referred to as plaintiff, filed a suit seeking declaration that he was owner in possession of land entered against Khata No.23 min, Khatauni No.25 min, Khasra No.251, as per entry in the Jamabandi for year 1981-82 pertaining to Tika Dobar Khurd, Tappa Barra, Tehsil Nadaun, District Hamirpur. It was alleged that earlier the property was entered against Khata No.39 in the Jamabandi for year 1944-45 and that a suit was filed in the year 1948 in the Court of Sub Judge, Kangra, in which a compromise decree was passed and in terms of that compromise decree though land comprised in Khata No.39 of Jamabandi for the year 1944-45 was given to the defendants-respondents alongwith land entered against some other Khatas but, in fact, during the course of the execution of the warrant of possession issued pursuant to the aforesaid compromise decree, possession of this old Khata No.39 had not been delivered to the defendants-respondents and the plaintiff continued to be in its possession till the institution of the suit. It was alleged that the possession of this land having not been taken by the defendants-respondents, by executing the aforesaid compromise decree of 1948, within 12 years, the said decree had become inexecutable and he (plaintiff) had become owner on account

of the decree having become inexecutable and also on account of his possession being adverse.

3. Suit was contested by the defendants-respondents, who took the plea that they had filed an Execution Petition and a warrant of possession was issued by the Executing Court and while executing that warrant of possession the Tehsildar to whom that warrant had been forwarded delivered the possession of the entire land covered by that decree to them, including the suit land. Certain preliminary objections were also raised.

4. Trial Court framed various issues based on the pleadings of the parties and ultimately came to the conclusion that the possession of the suit land had been delivered to the defendants-respondents in the course of the execution of the decree passed in the year 1948. Suit was held to be not maintainable. In view of the aforesaid findings and findings on other issues, the suit was dismissed. Plaintiff went in appeal to the Court of District Judge. Appeal was dismissed and the findings of the trial Court and the decree passed by the said Court were affirmed.

5. I have heard the learned counsel for the plaintiff and also gone through the record.

6. During the course of the hearing, it has been conceded by the learned counsel for the appellant that substantial question of law No.1 on which the appeal was admitted in fact does not arise, because the decree dated 29.7.1948, passed in the suit of 1948, was in respect of the suit land also, which was entered against Khata No.39 in the Jamabandi for the year 1944-45. As regards rest of the

three substantial questions of law, learned counsel, relying upon the testimony of PW-4 Madan Singh Patwari and copies of entries in *Rojnamcha* Ex. P-10 and Ex. P-11, urged that possession of only a part of the land mentioned in the decree had been delivered to the defendants-respondents and that possession of the suit land, which was entered against Khata No.39 in the Jamabandi for year 1944-45, had not been delivered. He submitted that in the record of rights, which was prepared subsequent to the aforesaid two entries in the *Rojnamcha*, the name of the plaintiff continued to be recorded in the column of ownership and possession, which belies the finding of the two Courts below that the possession of the suit land (old Khata No.39) had been delivered to the defendants-respondents alongwith rest of the land covered by the decree.

7. Argument has been noticed only to be rejected. Admittedly, defendants-respondents filed Execution Petition and the Presiding Officer of the Executing Court, namely Sub Judge, Kangra, issued a warrant of possession. That warrant of possession was sent to the Tehsildar for execution. Tehsildar submitted a report to the Executing Court. Copy of the report is Ex. DW-5/A. As per this report, the possession of the entire land, described in the decree and the warrant of possession, stood delivered to the defendants-respondents. The detail of the entire land the possession of which was delivered to the defendants-respondents finds mention in the report also. Khata No.39 (old) is also mentioned in this report.

8. Not only this, there is an order of the Director (Consolidation) Ex. D-1, a perusal of which shows that during the

course of the consolidation defendants-respondents were found in possession of the suit land and an order was passed by the Consolidation Officer for the correction of entries with respect to the suit land in favour of the defendants-respondents, which order was challenged by the plaintiff before the Director (Consolidation) and the Director (Consolidation) affirmed the order of the Consolidation Officer holding that though possession of the suit land had been delivered to the defendants-respondents alongwith the rest of the property described in the warrant of possession, in the year 1948, entries in the *Rojnamcha* and the revenue record with respect to the suit land, i.e. land entered against Khata No.39(old), were missed but on the spot defendants-respondents were in actual and physical possession as the possession had been delivered to them pursuant to the warrant of possession issued by the Civil Court in the year 1948.

9. In view of the abovestated position, substantial questions of law No.2, 3 and 4 are answered against the plaintiff and in favour of the defendants-respondents.

10. As a result of the above discussion and findings, appeal is dismissed.

CMPs No.46/1995 & CMP No.383/2007

11. In view of the dismissal of the main appeal, these applications have become infructuous and are disposed of as such.

June 20, 2007(sd) **(Surjit Singh), J.**